1999 WL 1062835 (F.C.C.), 14 F.C.C.R. 19,898, 14 FCC Rcd. 19,898, 18 Communications Reg. (P&F) 541

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments.

FCC 99-356
Adopted: November 18, 1999
Released: November 24, 1999

19898 By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we respond to a Petition for Declaratory Ruling filed on November 12, 1997 by Southwestern Bell Mobile Systems, Inc. (hereinafter, "Southwestern"). Southwestern requests the Commission to issue six specific rulings, that it asserts will be relevant to the resolution of issues now before the courts in class action law suits filed against Commercial Mobile Radio Service ("CMRS") providers, whether Section 332(c)(3) of the Communications Act [FN1] bars various claims alleging that the CMRS-provider defendants in those cases have violated state consumer fraud and/or contract laws by their marketing and billing practices relating to the charging for incoming calls and charging for calls in whole-minute increments. As set forth following, we grant Southwestern's Petition as discussed herein and otherwise deny the petition.

II. BACKGROUND

2. Southwestern states that numerous class action lawsuits have been filed in state and federal courts, challenging two practices of Commercial Mobile Radio Service (hereinafter, "CMRS") [FN2] providers: ***19899*** charging for calls in whole minute increments ("rounding up") and charging subscribers for incoming calls. In its petition, Southwestern refers particularly to one such action pending in the U.S. District Court

in Massachusetts, Smilow v. Southwestern Bell Mobile Systems, Inc., Civ. A. No. 97-10307-REK, in which the plaintiffs allege that the language in Southwestern's service contract with its subscribers did not permit either the billing of calls in rounded-up whole minute increments or the charging for incoming calls. Plaintiffs contend that Southwestern therefore had breached its contracts with its subscribers (Count I); and that, by providing its service in breach of contract, Southwestern had engaged in "unjust practices" in violation of Section 201(b) of the Communications Act (Count II) and "willful and knowing unfair and deceptive trade practices" in violation of Massachusetts statute (Count III). [FN3] According to Southwestern, lawsuits like Smilow are "widespread and the problems they create are general in nature." [FN4]

3. To assist in the resolution of these lawsuits, Southwestern requests the Commission to declare that:

(a) Congress and the Commission have established a general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation;

(b) charging for CMRS calls in whole-minute increments (sometimes referred to as "rounding up") and charging for incoming calls are common CMRS industry practices which are not unjust or unreasonable under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b);

(c) the term "call initiation" in the CMRS industry refers to a cellular customer activating his or her phone both to place an outgoing call and to accept an incoming call;

(d) the definition of the term "rates charged" in Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), includes at least the elements of a CMRS provider's choice of which services to charge for and how much to charge for these services;

(e) challenges to the "rates charged" to end users by a CMRS provider, including charges for incoming calls and charges in whole-minute increments, are exclusively governed by federal law under Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3); and

19900 (f) state-law claims directly or indirectly challenging the " rates charged" by CMRS providers are barred by Section 332(c)(3). [FN5]

4. The Wireless Telecommunications Bureau invited interested parties to file comments on Southwestern's petition in a Public Notice, released November 24, 1997, DA 97-2464. Eighteen parties filed comments and six parties filed reply comments. [FN6]

III. DISCUSSION

A. Overview

5. We decide, first, to address the rulings requested by Southwestern. Although rulings by the Commission may not be required for the Smilow case, [FN7] we do not believe that we should dismiss Southwestern's petition. We recognize that in recent years numerous class action lawsuits have been filed in state and federal courts contending that the billing, advertising and other practices of cellular carriers and other CMRS

providers violate state contractual and consumer fraud laws, [FN8] and that there is substantial uncertainty whether and to what extent such court actions are precluded by Section 332(c)(3) of the Act. We note that, in response to our public notice of the Southwestern petition, extensive comments have been filed by interested parties. Thus, we are in a position to help clarify some of the current uncertainty. Southwestern has requested six specific rulings by the Commission, which it and other commenters believe are relevant to the issues before the courts. We will therefore address the issues presented in Southwestern's petition and evaluate each of the specific requested rulings on the basis of law and the record before us. We cannot and do not rule here, however, whether the two practices at issue in this proceeding are or are not consistent with the terms of any CMRS provider's specific service contracts with its subscribers or whether any CMRS provider has in its specific advertising and/or marketing failed to adequately disclose these practices in violation of state consumer fraud laws.
19901 6. In the lawsuits that have been filed against them, CMRS providers have frequently asserted that the suits seek relief that constitutes state regulation of rates, which is prohibited by Section 332(c)(3)(A) of the Act. This Section provides that:
... no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service ..., except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile service. [FN9]
The United States Court of Appeals, 5th Circuit, has recently agreed with the Commission's interpretation of Section 332(c)(3)(A) as providing that "States: (1) in general can never regulate rates and entry requirements for CMRS providers; (2) are free to regulate all other terms and conditions for CMRS providers; (3) may regulate CMRS rates and entry requirements when they have made a substitutability finding in connection with universal service programs, and (4) may also regulate CMRS rates if they petition the FCC and meet certain statutory requirements, including either substitutability or unjust market rates." [FN10]
7. Section 332(c)(3)(A) bars lawsuits challenging the reasonableness or lawfulness per se of the rates or rate structures of CMRS providers. [FN11] On the other hand, Section 332(c)(3)(A) provides an exception for state regulation of "the other terms and conditions of commercial mobile service." The House Report on the Omnibus Budget Reconciliation Act of 1993, in which the amended language in Section 332 was enacted, states that, "[by] 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters ...." [FN12] Courts considering the issue so far have held that Section 332(c)(3)(A) does not preempt ***19902*** complaints that do not allege that billing practices of CMRS providers are unlawful per se, but challenge the implementation of these practices on grounds of breach of contract, consumer fraud, or false advertising. [FN13]
8. In its petition, Southwestern requests the Commission to issue six specific declaratory rulings, set forth in paragraph 3, supra, which we consider below.

B. The Specific Rulings Requested by Southwestern

First Requested Ruling: Congress and the Commission Have Established a General

Preference That the CMRS Industry Be Governed by the Competitive Forces of the Marketplace, Rather than by Governmental Regulation.

9. In support of this proposed ruling, Southwestern points out that Congress revised Section 332(c)(3) of the Communications Act in 1993 to generally preclude states from regulating the rates for CMRS services, [FN14] and that the Commission has noted that this legislation "reflect[ed] a general preference in favor of reliance on market forces rather than regulation ...." [FN15] Several of the CMRS provider commenters also argue in support of this ruling that a preference for competition over regulation for CMRS is reflected, in addition, by the Title II forbearance authority granted the Commission in Section 332(c)(1). [FN16] Indeed, none of the commenters challenges the correctness of the ruling proposed by Southwestern. We agree that, as a matter of Congressional and Commission policy, there is a "general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation," [FN17] and we grant Southwestern's petition in this respect.

10. We condition our ruling, however, in the context of an evolving CMRS market. In the same Commission order quoted by petitioner in support of the principle that there is a general preference for competitive forces over regulation, the Commission also emphasized that:

19903 ...[W]e do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and Federal regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied. [FN18]

As discussed in paragraphs 6 and 7 above, Congress has explicitly permitted regulation of "the other terms and conditions of commercial mobile service" by the states. We therefore do not agree with the arguments of Southwestern or CMRS provider commenters to the extent that they imply that such preference for competition over regulation results in a general exemption for the CMRS industry from the neutral application of state contractual or consumer fraud laws.

Second Requested Ruling: Charging for CMRS Calls in Whole-Minute Increments (Sometimes Referred to as "Rounding Up") and Charging for Incoming Calls are Common CMRS Industry Practices Which Are Not Unjust or Unreasonable under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b).

11. Section 201(b) of the Communications Act provides:

"All charges, practices, classifications, and regulations for and in connection with such communications service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful ...."

12. Southwestern points out that charging in whole minute increments and charging for incoming calls are common industry practices, [FN19] and asserts that these practices have been accepted as lawful by the Commission and state regulatory agencies. [FN20] Southwestern further contends that charging in whole minute increments and charging for inbound calls should be considered reasonable pursuant to the traditional tests in the implementation of Section 201(b). [FN21] In this regard, Southwestern contends that the accepted tests of reasonableness of a rate are that rates should be "reasonably related to the cost of providing service," [FN22] and that rates should "reflect or emulate competitive market operations." [FN23]

*19904 13. The CMRS providers and CMRS industry associations submitting comments agree that these industry practices are reasonable and lawful under Section 201(b). [FN24] Even Smilow and the plaintiffs in pending class action law suits filing comments in opposition to Southwestern's petition do not argue that whole minute billing and charging for incoming calls are precluded by Section 201(b). Smilow states that in her complaint she "makes no general or abstract attack on either of these billing practices ... [and] only attacks those billing practices as violative of § 201(b), because defendant agreed, in the Contract it drafted, not to charge in that way." [FN25]
14. Interexchange telephone services historically have been billed on a rounded-up, whole minute basis, and this is still the most common billing practice for interexchange services, as well as for CMRS. [FN26] The Commission has never questioned the lawfulness of this industry practice for the provision of CMRS, and rounded-up, whole minute billing has never been found by the Commission to be violative of Section 201(b). [FN27] As the Commission noted in its recently adopted Declaratory Ruling and Notice of Proposed Rulemaking regarding Calling Party Pays service offerings, most CMRS subscribers currently pay a per minute charge for incoming calls. [FN28] We find that these industry practices are not per se violative of Section 201(b) of the Communications Act. As Southwestern has pointed out, charging for calls on a whole minute basis "is a simplified method on which to base charges which still reflects general costs," [FN29] and that "charging for incoming calls is reasonable because the carrier incurs costs to switch and transport calls for incoming calls ...." [FN30] Accordingly, these rate practices are clearly among those which CMRS providers, consistent with Section 201(b) of the Act, have discretion to implement for their services. We will therefore grant this requested ruling.
15. It should be understood, however, that we conclude only that the charging in whole minute increments and charging for incoming calls are not in themselves "unjust or unreasonable" in violation of *19905 Section 201(b) of the Act. In this regard, we emphasize that if a carrier employs unreasonable practices, [FN31] the carrier may be found to be in violation of Section 201(b), even if the rates and rate structures themselves are not unreasonable. [FN32] We do not conclude that the implementation of these industry practices by CMRS providers will necessarily be lawful under Section 201(b) of the Act in all circumstances and without regard to other contractual, service and marketing practices of the CMRS provider.
Third Requested Ruling: The Term "Call Initiation" in the CMRS Industry Refers to a Cellular Customer Activating His or Her Phone Both to Place an Outgoing Call and to Accept an Incoming Call
16. The term "call initiation" is used in the service contract in issue in the Smilow case, [FN33] and the definition of this term, accordingly, may be relevant to that proceeding. Southwestern states that "[t]he FCC, with the benefit of its technical and policy expertise, should advise the court that the term 'call initiation,' as used in the CMRS industry, refers to the CMRS customer activating his or her phone, e.g., by pressing the 'SEND' button, to either place an outgoing call or accept an incoming call, and the initiation and termination of a call (by pressing the 'END' button) is the same no matter whether the call is an incoming or an outgoing one." [FN34]
17. We decline to issue this requested ruling. The Commission has no special technical or policy expertise to illuminate the question of what constitutes "call initiation" for

either the outgoing or incoming calls of wireless carriers. "Call initiation" is not a term defined in the Commission's Rules. Neither Southwestern nor any of the other CMRS providers filing comments in support of Southwestern's petition have brought to our attention any Commission decision or order in which this term is defined. In the competitive marketplace CMRS providers may use different methods for defining the services they provide to their customers. [FN35] Moreover, we do not reach any conclusion with regard to Southwestern's request to the extent that it relates to a carrier's charging for incoming calls as part of call initiation. Although ***19906** some wireless carriers may charge for incoming calls as part of call initiation, determining whether call initiation includes charges for incoming calls should be determined based on specific facts and circumstances of a particular case.

Fourth Requested Ruling: The Definition of the Term "Rates Charged" in Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), Includes at Least the Elements of a CMRS Provider's Choice of Which Services to Charge for and How Much to Charge for these Services

18. Southwestern points out that Section 332(c)(3)(A) denies states authority to regulate the rates charged for any Commercial Mobile Radio Service, [FN36] and it argues that, "if a state were allowed to regulate either which service a CMRS provider could charge for or how much it could charge, Congress' intent in Section 332(c)(3) would be thwarted." [FN37] The CMRS- provider commenters agree. [FN38] The opposing comments filed by class action plaintiffs do not specifically address this issue. [FN39]

19. States are precluded by Section 332(c)(3)(A) from regulating the "rates charged" by any CMRS provider. [FN40] In interpreting this language, it should be recognized that a "rate" has no significance without the element of service for which it applies. As Sprint PCS points out in its comments, [FN41] the term "rate" is defined in the dictionary as an "amount of payment or charge based on some other amount." [FN42] In this regard also, the Supreme Court has recently stated:

Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. [FN43]

20. Furthermore, the Commission has interpreted the "rates charged by" language in Section 332(c)(A) to "prohibit states from prescribing, setting, or fixing rates" of wireless service providers. [FN44] ***19907** Thus, we find that the term "rates charged" in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.

Fifth Requested Ruling: Challenges to the "Rates Charged" to End Users by a CMRS Provider, Including Charges for Incoming Calls and Charges in Whole- Minute Increments, Are Exclusively Governed by Federal Law under Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3)

Sixth Requested Ruling: State-law Claims Directly or Indirectly Challenging the "Rates Charged" by CMRS Providers Are Barred by Section 332(c)(3)

21. We will address Southwestern's last two requested rulings together because they appear to state related principles. We note, first, from the discussion in its petition, it

appears that Southwestern is seeking a broader preemption of state law than indicated by the language of its requested rulings.
22. Southwestern contends that "[u]nder the appropriate definition of 'rates charged,' it is clear that state law claims such as those asserted in Smilow are prohibited by Section 332(c)(3)." [FN45] It argues in this regard that awards of damages against CMRS providers in favor of their customers "constitute rate regulation" by states prohibited by the Act, [FN46] and that a grant of injunctive relief against a CMRS provider is also preempted by Section 332(c)(3). [FN47] According to Southwestern, "[i]t is no consequence if the state law claim challenging the CMRS provider's charges is labeled a claim for breach of contract, unfair trade practices, or the like -- rather than as direct challenges to the rates themselves; nor does it matter whether the plaintiffs claim that they are challenging the disclosure of a rate policy, rather than the rates themselves." [FN48] A number of the CMRS providers submitting comments also argue that Section 332(c)(3) bars courts from awarding damages to be paid by CMRS providers to their customers and from enjoining CMRS providers from violating state laws. [FN49] On the other hand, the class action plaintiff parties rely on the "except" clause in Section 332(c)(3)(A), i.e., "except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile communications," and on the "savings ***19908*** clause" in Section 414 of the Communications Act [FN50] to argue that CMRS providers are fully subject to state laws relating to contracts and consumer fraud. [FN51]
23. We find that it is clear from the language and purpose of Section 332(c)(3) of the Act that states do not have authority to prohibit CMRS providers from charging for incoming calls or charging in whole minute increments. This would "regulate ... the rates charged by ...[a] commercial mobile service ...." [FN52] We do not agree, however, that state contract or consumer fraud laws relating to the disclosure of rates and rate practices have generally been preempted with respect to CMRS. [FN53] Such preemption by Section 332(c)(3)(A) is not supported by its language or legislative history. As discussed above, the legislative history of Section 332 clarifies that billing information, practices and disputes -- all of which might be regulated by state contract or consumer fraud laws -- fall within "other terms and conditions" which states are allowed to regulate. [FN54] Thus, state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332. [FN55]
24. With regard to Southwestern's position as it relates to damages awards, we decline to address this issue in this order. We note that a Petition for Declaratory Ruling has recently been filed by Wireless Consumers Alliance which specially requests the Commission to declare, "whether the provisions of the Communications Act of 1934, as amended, or the jurisdiction of the Federal Communications Commission thereunder, serve to preempt state courts from awarding monetary relief against commercial mobile radio service ('CMRS') providers (a) for violating state consumer protection laws prohibiting false advertising ***19909*** and other fraudulent business practices, and/or (b) in the context of contractual disputes and tort actions adjudicated under state contract and tort laws." [FN56] Southwestern's petition and the comments in this proceeding will be incorporated into the record of the Wireless Consumer Alliance declaratory proceeding and we will consider the issues presented herein,

concerning whether, and in what circumstance, damages awards against CMRS providers are preempted by Section 332(c)(3) of the Communications Act, in that proceeding.

IV. CONCLUSIONS

25. In response to Southwestern's petition, we have reviewed the six specific issues raised regarding the CMRS marketplace and practices and state authority with regard to CMRS practices and rates. We grant Southwestern's petition, as discussed herein, and otherwise deny its petition.

V. ORDERING CLAUSE

26. Accordingly, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 154(j), Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, IT IS ORDERED, that the Petition for Declaratory Ruling filed by Southwestern Bell Mobile Systems, Inc. is GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

FN1. 47 U.S.C. § 332(c)(3).

FN2. Section 20.3 of the Commission's Rules, 47 C.F.R. § 20.3, defines a "commercial mobile radio service" as:
A mobile service that is:
(a) (1) provided for profit, i.e. with the intent of receiving compensation or monetary gain;
(2) An interconnected service; and
(3) Available to the public, or to such classes of eligible users as to effectively available to a substantial portion of the public; or
(b) The functional equivalent of such a mobile service described in (a) of this section.

FN3. Comments of Smilow, attached "Class Action Complaint in Civil Action No. 97-10307-REK", pp. 11-15. Subsequent to the filing of Southwestern's instant petition, the court in that proceeding, based on the facts and Massachusetts contract law, granted Southwestern's motion for summary judgment on the plaintiff's claim that Southwestern's rounded-up whole minute billing was in breach of contract, but denied summary judgment to either party on the plaintiff's breach of contract claim with respect to Southwestern's charging for incoming calls. In so ruling, the court determined that plaintiff's contract claims were not preempted by the Communications Act. Smilow v. Southwestern Bell Mobile Systems, supra., Memorandum and Order,

issued June 10, 1999.

FN4. Reply Comments of Southwestern, p. 9.

FN5. Petition for Declaratory Ruling, pp. 3-4.

FN6. The parties filing comments and reply comments are listed in the Appendix. CMRS providers and CMRS industry associations filed comments generally supporting the grant of Southwestern's petition. Opposing comments were filed by parties representing plaintiffs in class action law suits against CMRS providers. No comments were received from states or state agencies.

FN7. In its petition, Southwestern states that "the court [in the Smilow case] concluded the FCC might be the more appropriate body to make at least an initial determination with respect to various issues in that case, and [Southwestern] filed this Petition to provide the Commission the opportunity to consider those issues." (Petition, p. i.) It appears, however, that the Smilow court has not in fact referred the specific issues posed in Southwestern's petition or any other issues to the Commission for its determination and that the Smilow court does not seek any rulings from the Commission. Southwestern thereafter clarified in its Reply Comments that, although the Smilow case "was a catalyst for the filing of [its] Petition at the Commission, ... [it] did not seek to limit its Petition to that case, since the types of lawsuits [it] addressed are widespread and the problems they create are general in nature." (Reply Comments of Southwestern, p. 9.)

FN8. In its comments filed in this proceeding, Bell Atlantic Mobile, Inc. (hereinafter "Bell Atlantic") sets forth a list of 51 suits filed by class action plaintiffs against CMRS providers. Accordingly to Bell Atlantic's list, 43 of these suits include challenges to the lawfulness of a CMRS practice in billing for calls in rounded-up whole minute increments. Comments of Bell Atlantic Mobile, Inc., Attachment 1.

FN9. Section 332(c)(3)(A), in addition, provides for continued regulation of CMRS rates by a state where the Commission concludes, upon petition by the state, that:
(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or that rates are unjustly or unreasonably discriminatory; or
(ii) such market conditions exist and such service is a replacement for telephone land line exchange service with such State.
None of the petitions filed by states pursuant to these provisions have been granted. See, e.g., Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates, 10 FCC Rcd 7486 (1995); Petition of New York State Public Service Commission to Extend Rate Regulation, 10 FCC Rcd 8187 (1995).

FN10. Texas Office of Public Utilities Counsel, et al. v. FCC, 183 F. 3d 393, 432 (5th Cir. 1999).

FN11. See Comcast Cellular Telecommunications Litigation, 949 F. Supp. 1193, 1201 (E.D. Pa. 1996) (U.S. District Court ruled that claims in a class action complaint, which contended that a cellular carrier violated state contract law duties of "good faith and fair dealing" and was "unjustly enriched" by billing customers for non-connect time and in rounded up full minute increments, presented a "direct challenge to the way in which [the carrier] actually calculates the length of a cellular phone call and the rates which are charged for such a call," and "[t]hus any state regulation of these practices is explicitly preempted under the terms of the Act.")

FN12. H.R. Rep. No. 103-111, 103rd Congress, 1st Sess. 211, 261, reprinted in 1993 U.S.C. A.A.N. 378, 588.

FN13. See Tenore v. AT&T Wireless, 136 Wash.2d 322, 335-345, 962 P.2d 104, 110-115 (1998), cert. denied, ____ U.S. ____, 119 S.Ct. 1096 (1999); Sanderson v. AWACS, Inc., 958 F. Supp. 947, 956-958 (D.Del. 1997); DeCastro et al. v. AWACS, Inc., 935 F. Supp. 541, 554-55 (D. N.J. 1996).

FN14. Petition for Declaratory Ruling, p. 4.

FN15. Id., quoting from In re Petition of New York State Public Service Commission to Extend Rate Regulation, 10 FCC Rcd 8187, ¶ 18 (1995).

FN16. Comments of Comcast Cellular Communications, Inc., pp. 7-13; Comments of Cellular Telecommunications Industry Association, pp. 3-4; Comments of AT&T Wireless, pp. 3-6.

FN17. The Congressional policy to favor competition over regulation, where in the public interest, is also clearly reflected in the enactment of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending the Communications Act of 1934, codified in 47 U.S.C. 151 et seq.). In Section 10 thereof (47 U.S.C. § 160), the Commission is directed to forbear from applying any regulation or provision of the Act, where the Commission finds, in accordance with the provisions of that section, that the continued enforcement of the regulation is not required to protect the public and that forbearance from applying the regulation is consistent with the public interest. In determining whether the application of a regulation should be forborne, the Commission is required to "consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions .... and that determination may be the basis for a Commission finding that forbearance is in the public interest." Section 10(b) of the Communications Act, 47 U.S.C. § 160(b).

FN18. Petition of New York State Public Service Commission to Extend Regulation, supra., ¶ 19.

FN19. Petition, pp. 6-7.

FN20. Id., pp. 8-11.

FN21. Petition, pp. 7-8.

FN22. In support of this, Southwestern cites United States Transmission Systems, Inc. (Revision to Tariff F.C.C. No. l), 66 F.C.C. 2d 1091, ¶ 5 (1977).

FN23. In support of this, Southwestern cites Petition of New York State Public Service Commission to Extend Rate Regulation, 10 FCC Rcd 8187, ¶ 17 (1995)

FN24. See, e.g., Comments of Primeco Personal Communications, LP, pp. 3-5; Comments of Sprint PCS, pp. 5-6; Comments of 360 <<degrees>> Communications Co., pp.2-4; Comments of AT&T Wireless Services, Inc., pp. 7-8; Comments of AirTouch Communications, pp. 4-5; Comments of Century Cellnet, Inc., pp. 2-4; Comments of Liberty Cellular, Inc. and North Carolina RSA 3 Cellular Telephone Co., pp. 4-5; Comments of BellSouth, pp. 2-6; Comments of Bell Atlantic Mobile, Inc., pp. 21-23.

FN25. Comments of Smilow, Exhibit C, p. 4 (emphasis in original).

FN26. Comments of AT&T Wireless Services, Inc., p. 7; Comments of Primeco Personal Communications, Inc., p. 4; Comments of Cellular Telecommunications Industry Association, p. 12.

FN27. As Southwestern points out in its petition, at pp. 9-10, the Common Carrier Bureau has previously dismissed a petition for rulemaking requesting that the Commission prescribe a rule "requiring all interstate long-distance carriers to bill all customers on a per-second basis rather than on a per- minute or per-six second basis," because these requested rule changes "appear unlikely to benefit consumers." Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to David L. Pevsner, Esq., dated December 2, 1993.

FN28. See Calling Party Pays Service Option in the Commercial Mobile Radio Services, Declaratory Ruling and Notice of Proposed Rulemaking, WT Docket No. 97-207, FCC 99-177, released July 7, 1999, at ¶ 2 (CPP Service Offering Notice). The Commission also has found that an optional CMRS offering in which the called party subscribers are not charged for incoming calls is still a CMRS service.

FN29. Petition, p. 7.

FN30. Id., p. 8.

FN31. Cf., Toll Free Service Access Codes, Second Report and Order, 12 FCC Rcd 11262 (1997) (warehousing of toll free access numbers determined to be in violation of Section 201(b)); The People's Network Incorporated v. American Telephone and Telegraph Company, 12 FCC Rcd 21081, ¶¶ 11-18, (Com. Car. Bur. 1997)

(unreasonable delays in billing determined to be in violation of Section 201(b)).

FN32. Specifically, we do not rule on the question presented by the Smilow complaint before the U.S. District Court, whether billing in whole minute increments and charging for incoming calls would be violative of Section 201(b) of the Act, if, as alleged in Smilow's complaint, these practices are implemented in violation of the terms of a contract applicable for the service.

FN33. The service contract in issue in that proceeding provide in part that: Chargeable time for calls originated by a Mobile Subscriber Unit starts when the Mobile Subscriber Unit signals call initiation to Cl's [Cellular One's] facilities and ends when the Mobile Subscriber Unit signals call disconnect to Cl's facilities and the call disconnect signal has been confirmed. Chargeable time may include time for the cellular system to recognize that only one party has disconnected from the call, and may also include time to clear the channels in use.

FN34. Petition, pp. 11-12.

FN35. See Comments of BellSouth, p.6, fn. 20.

FN36. Petition, p. 14.

FN37. Id., pp. 14-15.

FN38. See, e.g., Comments of Ameritech, p. 4; Comments of Sprint PCS, pp. 6-9; Comments of Vanguard Cellular Systems, Inc., p. 3.

FN39. See Comments of Smilow; Comments of Carr, Korein, Tillery, Kunin, Montory, Cates & Glass: and Reply Comments of Staack and Klemm, P.A.

FN40. 47 U.S.C § 332(c)(3)(A).

FN41. Comments of Sprint PCS, p. 7.

FN42. Webster's Third New International Dictionary (1993) (emphasis added).

FN43. American Telephone and Telegraph Company v. Central Office Telephone, Inc., 524 U.S. 214, 118 S.Ct 1956, 1963 (1998).

FN44. CTIA v. FCC, 168 F.3d 1332, 1336 (D.C. Cir. 1999), citing In re Pittencrief Communications, Inc., 13 FCC Rcd 1735, 1745 (1997).

FN45. Petition, p. 15.

FN46. Id., pp. 17-23.

FN47. Id., pp. 23-24.

FN48. Id., pp. 24-27.

FN49. Comments of Comcast Cellular Communications, Inc., pp. 13-22; Comments of GTE Service Corp., pp. 6-8.; Comments of Century Cellnet, Inc., pp. 5-7; Comments of 360 <<degrees>> Communications Co., pp. 5-6; and Comments of Bell Atlantic Mobile, Inc., pp. 13-18.

FN50. "Nothing in this Act contained shall in any was abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." 47 U.S.C. § 414.

FN51. Comments of Smilow, pp. 18-19; and Comments of Carr, Korein, Tillery, Kunin, Montory, Cates & Glass, pp. 5-9.

FN52. See Comcast Cellular Telecommunications Litigation, discussed in paragraph 6, supra.

FN53. We further note that, although the exercise of state authority regarding state contract consumer fraud law is not prohibited, there may be a jurisdictional basis for the Commission to exercise authority as well. As noted above, the Commission has recently commenced a rulemaking in its Calling Party Pays proceeding. There, the Commission is seeking comment on the relationship between the rates charged and a proposed notification to parties calling wireless subscribers that would provide a nationwide means of disclosing the rates to the calling parties. In that proceeding, the Commission recognizes (1) that there may be jurisdictional grounds under Section 201(b) and Section 332(c)(3)(A) for it to implement a nationwide announcement providing the rate information along with other information, and (2) that the states have a role under Section 332(c)(3)(A) to regulate other terms and conditions of any CMRS service. See CPP Service Offering Notice, ¶¶ 34-43 & n.86. The Commission is also seeking comment in regard to whether its proposed notification ought to be sufficient to establish an "implied-in-fact" contractual arrangement between the CMRS provider and the calling party. Id. at ¶ 52.

FN54. See paragraph 7, supra.

FN55. See Tenore v. AT&T Wireless, supra. The Commission previously has "declined to define a particular demarcation point between preempted rate regulation and retained authority over other terms and conditions." Revisions of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling System, 14 FCC Rcd 1669, fn. 24. See also, Petition of the People and State of California and the Public Utilities Commission of the State of California to Retain Regulatory over Intrastate Cellular Service Rates, supra, at 7546. We also are not able to do this on the basis of the record in this proceeding.

FN56. Petition for Declaratory Ruling by Wireless Consumers Alliance, Inc., filed July 16, 1999. The Commission has sought public comment on the WCA petition. Public Notice, WT 99-253, DA 99-1458, released July 28, 1999.

***19910** APPENDIX

PARTIES FILING COMMENTS

1. 360 <<degrees>> Communications Company
2. AT&T Wireless Services, Inc.
3. AirTouch Communications, Inc.
4. Ameritech
5. Bell Atlantic Mobile, Inc.
6. BellSouth Corporation
7. Carr, Korein, Tillery, Kunin, Montory, Cates & Glass
8. Cellular Telecommunications Industry Association
9. Century Cellnet, Inc.
10. Comcast Cellular Communications, Inc.
11. GTE Service Corporation
12. Liberty Cellular Inc. and North Carolina RSA 3 Cellular Telephone Company
13 Omnipoint Communications, Inc.
14. Personal Communications Industry Association
15. Primeco Rural Telecommunications Group
16. Jill Ann Smilow
17. Sprint PCS
18. Vanguard Cellular Systems, Inc.

PARTIES FILING REPLY COMMENTS

1. Comcast Cellular Communications, Inc.
2. GTE Service Corporation
3. Southwestern Bell Mobile Systems, Inc.
4. Staack and Klemm, P.A.
5. United State Cellular Corporation
6. Vanguard Cellular Systems, Inc..

1999 WL 1062835 (F.C.C.), 14 F.C.C.R. 19,898, 14 FCC Rcd. 19,898, 18 Communications Reg. (P&F) 541